No. 96-1577

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF ALASKA,
Petitioner,
v.
NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit correctly held that land that is the subject of the Alaska Native Claims Settlement Act may constitute Indian country within 18 U.S.C. § 1151(b).

2. Whether the Ninth Circuit correctly held that the determination whether land is Indian country within § 1151(b) should depend upon an *ad hoc*, six-part balancing test incapable of producing predictable results.

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No. 96-1557

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

Amici's interest in this case is two-fold. First, it presents a jurisdictional question of significance to many States: the legal standard that governs the delineation of "Indian country" based upon "dependent Indian communities." To

make this determination, the court of appeals fashioned a six-part balancing test that has no basis in statute or this Court's jurisprudence and that renders uncertain the sovereignty over much of Alaska and Indian-occupied lands in other States as well.

In addition, this case presents a question of utmost importance to the State of Alaska and to local governments in the State: whether the court of appeals correctly held that a huge expanse of land in north-central Alaska is "Indian country." The question whether the court of appeals was correct in holding that lands subject to the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1629e ("ANCSA"), can be "Indian country" is important not only for the 1.8 million acre region over which the Native Village of Venetie asserts jurisdiction, but also for other areas of the State that are potentially subject to assertions of jurisdiction by more than 225 other Native villages.

Because of the importance of the issues presented to *amici* and their members, *amici* submit this brief to assist the Court in the resolution of this case.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The areas of Alaska at issue have always been considered by that State to be subject to its general jurisdiction without impairment. The 1.8 million acre tract is neither an Indian reservation nor an Indian allotment, and all claims of aboriginal title were extinguished by ANCSA. Title to the disputed area is not held by the United States in trust but rather is held in fee simple and is freely alienable. The question at hand is whether this land is "Indian country" where Indian and not state sovereignty governs for many purposes. *See* U.S. Const. art. I, § 8, cl. 3 (Indian Commerce Clause); *Worcester v. Georgia*,

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

31 U.S. (6 Pet.) 515 (1832); *Williams v. Lee*, 358 U.S. 217, 219 n.4 (1959).

2. Use of the term "Indian country" for purposes of delineating jurisdiction has had a long history in this Court's jurisprudence. From the first usage in the Act of May 19, 1796, 1 Stat. 469, to this day, the term has been the touchstone for allocating sovereign power between the federal government and tribes on the one hand and States on the other. The scope and reach of the term has been left by Congress largely in this Court's hands. The early history is ably canvassed by Justice Miller's opinion for the Court in *Bates v. Clark*, 95 U.S. 204 (1877), and by Justice Matthews' opinion for the Court in *Ex Parte Crow Dog*, 109 U.S. 536 (1883). The current statutory definition of "Indian country" is found in Section 1151 of Title 18 of the United States Code, and explicitly applies only to part of that Title. However, this statute was adopted by Congress in 1948 as a recitation of this Court's jurisprudence and in that vein it has been applied for general purposes. The Section defines "Indian country" as consisting of (a) "Indian reservation[s] under the jurisdiction of the United States Government," (b) "dependent Indian communities," and (c) "Indian allotments, the Indian titles to which have not been extinguished."

3(a). This Court has not addressed the meaning of the phrase "dependent Indian community" since Section 1151 was enacted in 1948. The phrase is derived from this Court's rulings in *United States v. Sandoval*, 231 U.S. 28 (1913), and *United States v. McGowan*, 302 U.S. 535 (1938). Also instructive is *United States v. Pelican*, 232 U.S. 442 (1914), a case decided in the same term as *Sandoval*. Those decisions refer to federal "protection of a dependent people" living in "designate[d]" areas under the "supervision and guardianship of the United States." *McGowan*, 302 U.S. at 538.

(b). As *Pelican* instructs, a "dependent Indian community" exists where Congress explicitly "set[s] apart" land "for the use of the Indians as such, under the super-

intendence of the [Federal] Government." *United States v. Pelican*, 232 U.S. at 449. The federal set aside must be for the purpose of fostering a semi-autonomous Indian community. Moreover, federal superintendence over the Indian community must be active and pervasive. Both elements must be present and both must demonstrate a federal sovereign presence, not just federal activity, that displaces state sovereignty that otherwise would exist.

(c). This test provides a significant measure of predictability in an area where certainty of application is essential. By contrast, the Ninth Circuit's six-part balancing test would detach the meaning of "dependent Indian communities" from its historical basis in this Court's jurisprudence. As demonstrated by this case, the Ninth Circuit's test could be invoked to annul the States' sovereign powers, shifting that power to Indian groups even where the federal government declines to exercise supervision over them. The test thus threatens to upset the settled expectations of the States, and non-Indians who reside and do business in such areas.

4. The Ninth Circuit also ignored the special role of Natives in Alaska's history, which contrasts sharply to that of Indians in the lower 48 States. Since the days of Russian settlement, Native Alaskans generally have not been treated as comprising tribal entities that exercise sovereignty over an "Indian country." *See Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988). With the adoption of ANCSA in 1971, the few Native reserves created in the Alaska Territory were explicitly extinguished, excepting only the Annette Island Reserve of the Metlakatla, along with Native claims of title. ANCSA also expressly disavows creation or continuation of any trusteeship or wardship on the part of the Federal Government for Natives. Thus, Alaska's special history and ANCSA provide a compelling basis for the conclusion that there is no Indian country in Alaska.

ARGUMENT

I. A "DEPENDENT INDIAN COMMUNITY" DOES NOT EXIST ABSENT A SHOWING THAT LAND HAS BEEN "VALIDLY SET APART" BY EXPLICIT CONGRESSIONAL ACTION FOR THE USE OF AN INDIAN TRIBE UNDER FEDERAL SUPERINTENDENCE

This Court has long recognized that Congress' exclusive power over commerce with the Indian tribes may curtail the exercise of state sovereignty to the extent that state jurisdiction is determined to interfere with a competing federal interest. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Williams v. Lee*, 358 U.S. 217, 219 n.4 (1959) (discussing the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3). Congress has traditionally articulated the federal interest in regulation of the Indian tribes through statutes which by their terms operate within "Indian country"—in most cases leaving for the courts the task of delineating the boundaries of such "Indian country." *See Ex Parte Crow Dog*, 109 U.S. 556 (1883); *Bates v. Clark*, 95 U.S. 204 (1877) (construing meaning of "Indian country" in Revised Statutes § 2145 subsequent to repeal of definition of "Indian country" set forth in Indian Intercourse Act of June 30th, 1834).[2] Now the definition of "Indian country" serves as the touchstone for designating those geographic areas in which the Indian tribes, as a consequence of Congress' exclusive power respecting Indian affairs, retain certain attributes of their aboriginal tribal sovereignty as against the States. *See, e.g., Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Williams v. Lee*, *supra*.

[2] The operative term "Indian country" has been used in statutes enacted as early as 1796. *See* Act of May 19, 1796, 1 Stat. 469, 471, § 10 (prohibiting and specifying penalty for "purchasing a horse or horses . . . in the Indian country").

In some cases (*e.g., Sac and Fox Nation*) the Court has taken the requisite definition from 18 U.S.C. § 1151 (which by its terms applies only to chapter 53 of Title 18 of the U.S. Code); in other cases (*e.g., Citizen Band Potawatomi Indian Tribe*) the Court has not relied on Section 1151 but on its own precedents delineating the boundaries of "Indian country."

For these purposes, "Indian country" has meant either a reservation or something functionally equivalent to a reservation. The Ninth Circuit's holding takes a historically limited category of "Indian country"—that of "dependent Indian communities" found in the Pueblo and in a special federal "colony"—and expands it into an untenably broad principle of Indian autonomy that displaces state authority even where Congress has manifested a purpose that is expressly to the contrary. While acknowledging that this Court "has stressed the importance of an inquiry into whether tribal land was set aside by the federal government and whether the Natives who inhabit it are under the superintendence of the federal government," the court of appeals concluded "that these requirements should be construed broadly." Pet. App. 10a. It thus held "that the fact that a tribe holds title to land in fee simple, without any restrictions on alienation imposed by the federal government, should not in itself preclude a finding that the land was 'set aside' by the government." *Id.* at 11a. And it further asserted, quite erroneously, that the district court erred in requiring "that federal superintendence must be 'pervasive,' " in order to find that an area is Indian country. *Id.*

The Ninth Circuit indiscriminately recasts the traditional requirements of federal "set aside" and "superintendence" in a manner which, if affirmed, is likely to prompt numerous groups of Indians thought to hold land under general state jurisdiction to seek judicial declarations that they constitute "dependent Indian communities," which are entitled to exercise the prerogatives of sovereignty on such lands. Not only does the court of appeals' holding portend dire consequences for the exercise by States and local governments of their criminal, civil and regulatory jurisdiction, it also upsets the settled expectations of businesses which operate within, and non-Indians who live in, these areas. The Court should therefore clarify that "Indian country" in the form of a "dependent Indian community" exists only when Congress has expressly stated that the area is being "set apart for the use of the Indians under the superintendence of the [Federal] Government." *United States v. McGowan*, 302 U.S. 535, 539 (1938) (quoting *United States v. Pelican*, 232 U.S. 442, 449 (1914) (emphasis in original deleted)).

A. "Dependent Indian Communities" Can Exist Only Where There Is An Explicit Federal Set Aside Of Land With Federal Superintendence Of The Tribal Community

When Congress enacted 18 U.S.C. § 1151 in 1948, it intended to codify this Court's precedents interpreting the term "Indian country." [8] *See* Reviser's Note to Section 1151 ("Definition [of Indian country] is based on latest construction of the term by the United States Supreme Court in *U.S. v. McGowan*, following *U.S. v. Sandoval*.") (other citations omitted).

The term "dependent Indian communities" must thus be understood against the background of this Court's de-

[8] Section 1151 provides:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151.

cisions. "Indian country" has, of course, always included Indian reservations, a term which since the 1850's has referred to lands set aside under federal protection for the residence of tribal Indians. *See Donnelly v. United States*, 228 U.S. 243, 269 (1913) ("[N]othing can more appropriately be deemed 'Indian country,' . . . than a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation.").

In *United States v. Pelican*, 232 U.S. 442 (1913), also cited by the Reviser's Note to Section 1151, the Court had concluded that "Indian country" encompassed allotments made during the period of the General Allotment Act of 1887. Under that Act and similar statutes of this period, Congress sought to assimilate many tribes into non-Indian society by diminishing reservations and opening them up to settlement. *See Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650 n.1 (1976). The allotment system allowed individual Indians to receive allotments of land with the United States holding the land as trustee for a temporary period, upon the expiration of which the lands were conveyed in fee to the individual Indians. *See County of Yakima v. Confederated Tribes and Bands of the Yakima Nation*, 502 U.S. 251, 253-55 (1992).

The jurisdictional question in *Pelican* stemmed from this Court's decision in *Matter of Heff*, 197 U.S. 488, 502-03 (1905). In *Heff* this Court held that allotted lands were removed from the operation of federal statutes applicable to "Indian country." Congress disagreed, passing the Burke Act, 34 Stat. 182, which provided in part that "until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States." *See Pelican*, 232 U.S. at 451; *County of Yakima*, 502 U.S. at 255. *Pelican* reaffirmed that, so long as the trust period remained in effect, the allotted land was "Indian country":

> In the present case, the original reservation was Indian country simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the Government. *Donnelly v. United States, supra*. The same considerations, in substance, apply to the allotted lands which, when the reservation was diminished, were excepted from the portion restored to the public domain. The allottees were permitted to enjoy a more secure tenure and provision was made for their ultimate ownership without restrictions. But, meanwhile, the lands remained Indian lands set apart for Indians under governmental care; and we are unable to find ground for the conclusion that they became other than Indian country through the distribution into separate holdings, the Government retaining control.

232 U.S. at 449.

McGowan similarly applied the notion of Indian country to include lands held by the United States which constituted a *de facto* "reservation." *McGowan* involved a proceeding for the forfeiture of two automobiles on the ground that they had been used to introduce intoxicants into the Reno Colony, a 28 acre parcel of land that Congress purchased for the use of non-reservation Indians in Nevada; the Federal Government held title to the parcel. 302 U.S. at 536-37. Because the subject area was not within a reservation as such, the court of appeals affirmed a dismissal of the proceeding on the ground that the Reno Colony was not "Indian country." *Id.* at 536. This Court reversed, however, reasoning that the Indians there had been established "in homes under the supervision and guardianship of the United States," and held that Congress' decision to acquire land for, and to provide them a home in, a "colony" instead of a "reservation" was "immaterial." *Id.* at 538-39. Because the land for the Reno Colony had been purchased and "validly set apart for the use of the Indians," and because that land was under the title and superintendence of the federal government, it was "not reasonably possible to draw any distinction between this Indian 'colony' and 'Indian country.'" *Id.*

The third case cited by the revisers, *Sandoval*, is the source of the phrase "dependent Indian communities." In *Sandoval*, the Court considered Congress' power under the Constitution to denominate as "Indian country" for the purposes of a prohibition on introducing intoxicants into Indian country, the lands of the Pueblo Indians of New Mexico. Unlike the other Indian lands which the Court had considered, the Pueblo lands were not occupied and held by aboriginal title but had been the subject of land grants by a prior sovereign, the King of Spain. The Court noted that "[t]he lands belonging to the several pueblos vary in quantity, but usually embrace about 17,000 acres, held in communal, fee simple ownership under grants from the King of Spain made during the Spanish sovereignty and confirmed by Congress since the acquisition of that territory by the United States." 231 U.S. at 39. Nonetheless, the Court held that Congress' constitutional power respecting the Indian tribes extended to "all dependent Indian communities within [the United States'] borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State." 231 U.S. at 46. In view of the particular circumstances regarding the Pueblo, the Court concluded that Congress could elect to treat the Pueblo lands as part of "Indian country":

> As before indicated, by an uniform course of action beginning as early as 1854 and continued up to the present time, the legislative and executive branches of the Government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes . . . . [T]his assertion of guardianship over them cannot be said to be arbitrary but must be regarded as both authorized and controlling.

231 U.S. at 47; *see also United States v. Chavez*, 290 U.S. 357, 361-65 (1933); *United States v. Candelaria*, 271 U.S. 432 (1926) (discussing and following *Sandoval*).

This Court's jurisprudence thus establishes that "Indian country" consists of formally denominated Indian reservations and other areas which are their functional equivalent. Whether such areas are formally recognized as "reservations," or consist of land allotted from a former reservation and still held in trust by the United States for use by the Indians, *see Pelican*, land purchased by the United States and set aside for the use of a colony of Indians, *see McGowan*, or land granted by a prior sovereign for Indians, which has been explicitly recognized and confirmed by the United States, *see Sandoval*, there was in each case an explicit Congressional statement that the lands were to be used for a semi-autonomous Indian community subject to the Federal Government's continued "supervision and guardianship." *McGowan*, 302 U.S. at 538. The lands involved could thus be indisputably characterized as "validly set apart for the use of the Indians as such, under the superintendence of the [Federal] [G]overnment." *Id.* at 539 (quoting *Pelican*, 232 U.S. at 449) (emphasis in original deleted).[4]

That this Court has not recognized a "dependent Indian community" to exist in any circumstances other than those of the Pueblo in *Sandoval*, *Candelaria*, and *Chavez* demonstrates that only an extremely narrow category of Indian country can exist outside formally denominated reservations—and that limited category cannot include freely alienable land. Moreover, *Sandoval*, *Pelican*, and *McGowan* require that the federal set aside must be

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[4] Courts have applied the *McGowan-Pelican* standard for purposes of interpreting and applying Section 1151. *See, e.g., Indian Country, U.S.A., Inc. v. Oklahoma Tax Comm'n*, 829 F.2d 967, 974 (10th Cir. 1987), *cert. denied sub nom. Oklahoma Tax Comm'n v. Muskogee (Creek) Nation*, 487 U.S. 1218 (1988) (lands held in fee simple by the Creek Nation, subject to a treaty rendering them immune from state or territorial laws, satisfied *Pelican* test). Similarly, this Court has in some cases simply applied the *McGowan-Pelican* standard without reference to Section 1151. *See Potawatomi Tribe*, 498 U.S. at 511.

explicitly for the purpose of providing an area in which Indians can operate as a semi-autonomous community, subject to pervasive federal superintendence. Both elements must be strongly present so as to make it clear to the State, its citizens, and the business community, that Congress intended for a group of Indians to exercise the quasi-sovereignty traditionally associated with reservation status, subject to the ultimate control of the federal government.[5]

Here, while the Ninth Circuit acknowledged that this Court's teachings in *McGowan*, *Pelican*, and *Sandoval* instruct that "federal set aside and superintendence [are] prerequisites to the existence of a dependent Indian community," it further asserted the view—flatly contradicted by the Court's cases—"that these requirements should be construed broadly." Pet. App. 10a. It thus stretched the traditional understanding of a federal set aside far beyond anything ever recognized in this Court's cases and trivialized the concept of federal superintendence.

This Court should apply and re-emphasize the *McGowan-Pelican* rule in the plain terms originally adopted and long enforced by this Court. Adherence to this standard is

[5] In *Sandoval*, these elements were established by (1) the grant by the King of Spain of a communal, fee simple ownership that had been recognized and confirmed by explicit federal action, 231 U.S. at 39, (2) "agents and superintendents have been provided to guard their interests," *id.* at 40, and (3) Congress had expressly provided that neither the lands nor property of the Pueblo villages and individual Indians were to be subject to taxation by the Territory, and subsequently the State, of New Mexico. *Id.*

Pelican and *McGowan* are to similar effect. *Pelican* addressed when an allotment might be fully effective to terminate the federal set aside and federal superintendence. *McGowan* was concerned with a federal effort to provide a colony for needy Indians in Nevada who were not part of organized reservations, 302 U.S. at 537, and who could potentially benefit from living "in homes under the supervision and guardianship of the United States" on land held by the federal government for that purpose. *Id.* at 538.

necessary to protect against unintended encroachments on the States' historic police powers and to provide fair notice to those citizens who contemplate living in or engaging in business activity in set-aside areas. In contrast to the Ninth Circuit, other courts of appeals have recognized the implications for political sovereignty that are inherent in the federal set-aside and federal superintendence elements of *Sandoval*, *Pelican*, and *McGowan*. In *Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Co.*, 89 F.3d 908 (1st Cir. 1996), the First Circuit began its analysis of these issues by noting that it was in effect being asked to decide whether Indian sovereignty existed where state sovereignty would ordinarily apply. *See id.* at 915 (citing *Indian Country, U.S.A.*, 829 F.2d at 973). Thus, for "Indian country" to be recognized, the federal government's superintendence must be so pervasive as to manifest the displacement of the State's sovereignty. *See id.* at 920.

This Court should therefore clarify that the appropriate standard for identifying a "dependent Indian community" is the exacting standard reflected in *Sandoval* and set forth in *Pelican* and *McGowan*: whether Congress has expressly "set apart [an area] for the use of the Indians as such under the superintendence of the [Federal] Government." *McGowan*, 302 U.S. at 539 (quoting *Pelican*, 232 U.S. at 449). *See also Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) ("plain statement rule is . . . an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere").

II. THE ALASKA NATIVE CLAIMS SETTLEMENT ACT PRECLUDES RECOGNITION OF ANCSA LANDS AS "INDIAN COUNTRY"

Under the foregoing legal principles, ANCSA lands cannot comprise "Indian country." Congress manifestly did not "set aside" under "federal superintendence" the

land conveyed to the Venetie and other native groups under ANCSA to create an area similar to a reservation or allotment. On the contrary, ANCSA expressly revoked the few reserves that had been created in Alaska and abolished all claims of aboriginal title. Congress' settlement was to operate without establishing any of the incidents of superintendence or dependency, or conferring any sovereignty on Native groups:

> [T]he settlement should be accomplished rapidly, with certainty, . . . without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska.

43 U.S.C. § 1601(b). The Federal Government has never exercised a "superintendence" over the native inhabitants of Alaska similar to that which existed with respect to Indian tribes in the 48 contiguous States, and Congress confirmed Alaska's unique historical position in ANCSA.

A. Native Alaskans Have Been Subject To Federal, Territorial, And State Law, Not The Law Of A Tribal Sovereign

When the United States acquired the territory of Alaska from Russia in 1867, federal Indian policy was beginning a long shift towards assimilation. The Indian tribes were increasingly treated not as separate nations but as subject to the overlapping federal and state jurisdiction. "By 1880, the Court no longer viewed reservations as distinct nations. On the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law." *Organized Village of Kake v. Egan*, 369 U.S.

60, 72 (1962) (citation omitted). Thus, in 1871 Congress entirely abolished the power to make treaties with the Indian tribes. *Id.* (citation omitted). Further, in 1887 the General Allotment Act was passed, "authorizing the division of reservation land among individual Indians with a view toward their eventual assimilation into our society." *Id.*

These historical trends in Indian policy, especially given the sparse and extremely remote population of the Alaska territory, were reflected in the earliest provisions for the government of the territory and its native peoples. Russia had established no trusteeship or fiduciary arrangement with the native peoples of Alaska. *See* Memorandum from Solicitor, U.S. Department of the Interior to Secretary, U.S. Department of the Interior, No. M-36975 (January 11, 1993) at 13-14 (hereafter "1993 Interior Memorandum"). When this nation entered into the Treaty of Cession with Russia, the United States recognized no special claims by aboriginal peoples to the lands being ceded by Russia.[6] No treaties were entered into with any of the native tribes inhabiting the area in the short period of time before the treaty-making power was abolished. Nor did the federal government undertake any special responsibilities or functions with respect to natives in the

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[6] The Treaty of Cession with Russia provided in part:

> The cession of territory and dominion herein made is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants or possessions, by any associated companies, whether corporate or incorporate, Russian, or any other, or by any parties, except merely private individual property holders; and the cession hereby conveys all the rights and franchises, and privileges now belonging to Russia in said territory or dominion and appurtenances thereto.

15 Stat. 539, 543 (1867), quoted in 1993 Interior Memorandum at 15. *Cf. Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

territory.[7] Indeed, the territory had no formal government at all until 1884, when Congress passed the first Organic Act to provide for a territorial government. *See* 1993 Interior Memorandum at 15.

Early judicial precedents likewise confirmed that Alaska and all its peoples were under direct federal and subsequently territorial governance, without special provision for any distinct native sovereignty as had existed in the contiguous States and territories. Thus, prior to the creation of a territorial government, in contrast to the doctrine of *Ex Parte Crow Dog, supra,* Indian matters were treated under generally applicable federal laws, rather than laws of special application to "Indian country." For example, *United States v. Williams*, 2 F. 61 (D. Or. 1880), in dismissing a count for assault in Indian country, held that in light of Congress' specific action to designate Alaska as "Indian country" for purposes of the liquor control provisions of the Trade and Intercourse Act of 1834,[8] Alaska would not be considered as "Indian country" for purposes of the criminal statutes applicable to offenses within "Indian country." The court instead relied on a general federal statute applicable to attempted murder "within any place or district of country under the exclusive jurisdiction of the United States . . . and out of the jurisdiction of any particular state," reasoning

[7] Article III of the Treaty of Cession provided that the inhabitants of Alaska could return to Russia within three years but, if they chose to remain, would "be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States." 15 Stat. 539, 542, quoted in 1993 Interior Memorandum at 15.

[8] In an early case, *United States v. Seveloff*, 27 F. Cas. 1021 (D. Or. 1872), a prosecution for sale of liquor to Alaska natives was dismissed on the ground that the "Indian country" reached by the 1834 Trade and Intercourse Act was confined to areas east of the Rocky Mountains. Congress reacted by amending the statute to bring Alaska within "Indian country" for purposes of the statute's liquor control provisions. *See* 1993 Interior Memorandum at 17-18.

that "[w]ithout doubt Sitka, in Alaska, is a place under the exclusive jurisdiction of the United States." 2 F. at 62.

Similar results were reached after Congress formed a territorial government for Alaska. *Crow Dog* was specifically distinguished with respect to the Alaska territory in *Kie v. United States*, 27 F. 351 (D. Or. 1886), a case which recognized federal jurisdiction over a prosecution for the murder of one native Alaskan by another. Recognizing that *Crow Dog* prevented the courts of the United States from taking jurisdiction over crimes by Indians against Indians in "Indian country," the court concluded that "Alaska is not 'Indian country,' in the conventional sense in which that phrase is used in the act of 1834 and the Revised Statutes." *Id.* at 355. Judge Deady reasoned that the condition of the native Alaskans was distinct from that of native tribes encountered earlier in history, and that Congress intended that native people in Alaska be subject to the same laws as the rest of the territorial population:

> Nor is it at all probable that the aborigines of Alaska can or will be considered as dependent or domestic nations, or people having any title to the soil of the country, to be extinguished by the United States, as were the Indian tribes north and west of the Ohio river. The country was purchased from Russia in 1867.
>
> . . . .
>
> At the date of this cession Russia owned this country as completely as it now does the opposite Asiatic shore; and the right of the inhabitants in and to the use of the soil was such, and only such, as it saw proper to acknowledge or concede to them. The United States took the country on the same footing, agreeing to respect the private property of individuals, and to make such regulations concerning the uncivilized natives, including, of course, their occupation of the soil, as it might deem best. Accordingly, [*C*]*ongress, by the passage of the Alaska act*

> *of 1884, has provided a government for the country without any reservation or qualification as to the persons or classes of the inhabitants over and upon whom it shall have jurisdiction and authority.*

Id. at 354 (emphasis added).[9]

On the basis of these early decisions, it was concluded immediately prior to Alaska statehood that there was little, if any, "Indian country" in Alaska under 18 U.S.C. § 1151. *United States v. Booth,* 161 F. Supp. 269 (D. Alaska 1958). In *Booth,* the court held that Alaska's territorial jurisdiction would extend to the prosecution of crimes committed within the Metlakatla reserve,[10] on the grounds that such lands were not "Indian country." Judge Kelly reasoned that the Metlakatla reserve was not a "reservation" as that term had to be understood in historical context for the purposes of Section 1151(a), nor were the Metlakatlans a "dependent Indian community." 161 F. Supp. at 273. The district court noted

[9] To the same effect is *In re Sah Quah,* 31 F. 327 (D. Alaska 1886). In *Sah Quah,* the Tlingit holder of a putative slave, who was also a native Alaskan, claimed exemption from the Thirteenth Amendment under the doctrine of *Crow Dog.* The Court ordered that the petitioner be freed, holding that

> [t]he United States has at no time recognized any tribal independence or relations among these Indians, has never treated with them in any capacity, but from every act of [C]ongress in relation to the people of this territory it is clearly inferable that they have been and now are regarded as dependent subjects, amenable to the penal laws of the United States, and subject to the jurisdiction of its courts.

31 F. at 329; *see Metlakatla Indian Community v. Egan,* 369 U.S. 45, 50-51 (1962).

The prosecution in *Kie* and the civil action brought in *Sah Quah* straddled Congress' partial abrogation of the *Crow Dog* doctrine in 1885, when federal criminal law over specified crimes by Indians against Indians was extended to "Indian country." *See Organized Village of Kake,* 369 U.S. at 72.

[10] The historical circumstances of the Metlakatla reserve are described in *Metlakatla Indian Community,* 369 U.S. at 48-55.

that the bases for demarcating a separate "Indian country" did not apply to Alaska:

> [W]hen a territorial government was formed, the reasoning of the *Sah Quah* case suggested that all of the Indian inhabitants came within the jurisdiction of the territorial laws. . . . [I]t was the policy of the United States Government to allow Indian tribal organizations to maintain their traditional forms of self-government, and to recognize the tribes as dependent sovereignties. Southeastern Alaska has never known tribal organization since the purchase of Alaska from Russia.

Id. See also Metlakatla Indian Community, 369 U.S. at 51-52. *But see In re McCord,* 151 F. Supp. 132 (D. Alaska 1957).

B. ANCSA Revokes Any Prior "Set Aside" Of Land For Use By Alaska Natives And Disavows Any "Federal Superintendence" Over Such Land

The absence of "federal superintendence" of a distinct "Indian country" in Alaska was confirmed by Congress with the passage in 1971—only 13 years after Alaska became a State—of the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §§ 1601-1629e. The genesis of ANCSA was the existence, both before and after Alaska joined the Union, of unresolved claims of ownership of lands in Alaska by native Alaskan groups based on various theories of aboriginal title.

This Court had held in *Tee-Hit-Ton* that mere aboriginal "title," *i.e.,* occupancy prior to Alaska's acquisition by the United States not otherwise confirmed as title by Congress, could not give rise to a takings claim under the Fifth Amendment. 348 U.S. at 288-89 ("Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation."). The Court further held that neither the Organic Act for Alaska of

1884 nor a 1900 Act providing a civil government for Alaska had confirmed any aboriginal title claims. *Id.* at 278. However, *Tee-Hit-Ton* left uncertain the degree to which some aboriginal titles might have been confirmed by or under the authority of other acts of Congress. *See* 1993 Interior Memorandum at 68-69. Moreover, the Statehood Act for Alaska, 72 Stat. 339, neither confirmed nor denied the validity of such claims. *Organized Village of Kake*, 369 U.S. at 67.

Congress sought to resolve this situation with passage of ANCSA in 1971. The principal feature of ANCSA was the distribution of some 40 million acres of land and close to one billion dollars in cash to native Alaskan groups in return for the extinguishment of all aboriginal land titles and the revocation of all existing reservations, excepting only the Annette Island Reserve of the Metlakatla.[11] The land was conveyed by means of a patent in fee simple without restrictions on alienation. Along with cash payments the land was conveyed to corporate entities organized to represent Native Alaskans and to effect distribution of interests in the settlement through share ownership. *See* 43 U.S.C. § 1613.

Congress was unequivocal in specifying the effect of the settlement:

> Notwithstanding any other provision of law, and except where inconsistent with the provisions of this chapter, the various reserves set aside by legislation or by Executive or Secretarial Order for Native use

[11] The catalyst for ANCSA was the need to clear title to the land on which the Trans-Alaska oil pipeline would be built. By 1968, Alaska Natives had laid claim to some 337 million acres of land in Alaska, roughly 90% of the land in the State. Douglas M. Branson, *Square Pegs In Round Holes: Alaska Native Claims Settlement Corporations Under Corporate Law*, 8 UCLA-Alaska Law Rev. 103, 104 (1979). "Some of the more colorable Native claims lay directly in the path" of the proposed 789 mile-long trans-Alaska pipeline. *Id.*

> or for administration of Native affairs . . . are hereby revoked subject to any valid existing rights of non-Natives.

43 U.S.C. § 1618(a). The extinguishment of aboriginal title was similarly explicit:

> All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.
>
> All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

43 U.S.C. § 1603(b) and (c).

In addition to these express provisions, Congress carefully disclaimed any intent to establish or continue a "reservation-style" relationship between the Federal Government and the newly created corporations. Thus, Congress declared that the settlement with Alaska Natives should be accomplished "without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska." 43 U.S.C. § 1601(b). The same intent is unambiguously reflected in the legislative history of ANCSA.[12]

[12] The Senate report, S. Rep. No. 405, 92d Cong. (1971) (accompanying S. 35) stated, "A major purpose of this committee and the Congress is to avoid perpetuating in Alaska the reservation and

Given these provisions, the Ninth Circuit's conclusion that the land conveyed in fee simple under ANCSA was validly set apart for the use of the Indians as such, under the superintendence of the [Federal] Government, *see* Pet. App. 10a, is patently wrong. The land settlement effected under ANCSA cannot legitimately be compared to an allotment of land held in trust by the United States (*Pelican*), much less to a colony (*McGowan*), or to a dependent communal ownership with restrictions on alienation that had been confirmed by the United States in connection with the exercise of an explicit federal protection and superintendence (*Sandoval*). On the contrary, ANCSA enacts precisely the sort of "ultimate ownership without restrictions" which *Pelican* deemed sufficient to terminate "Indian country" status. 232 U.S. at 449. While ANCSA provided for a conveyance of the prior Venetie reserved lands to the pertinent Village Corporation, *see* 43 U.S.C. § 1618(b), Congress revoked the Venetie reserve itself. And it did so while expressly disclaiming any federal "guardianship." The necessary result of such action is that the land conveyed under ANCSA is not "Indian country" but rather is subject to the general civil jurisdiction of the State of Alaska.

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trustee system which has characterized the relationship of the Federal Government to the Indian people in the contiguous 48 states." *Id.* at 61, quoted in *Cape Fox Corp. v. United States*, 4 Cl. Ct. 223, 234 n.25 (1983).

"The House rejected H.R. 7039, which in section 12(b)(1) provided patent[s] would be issued promptly on completion of a survey of selected lands and that the Secretary would hold the lands and interests in lands to which a village may be entitled 'in trust' until the village [would] qualif[y] to own real property." *Cape Fox Corp.*, 4 Cl. Ct. at 234 n.25. The Conference Report, H.R. Conf. Rep. No. 746, 92d Cong., 1st Sess. 37, *reprinted in* [1971] U.S. Code Cong. & Admin. News 2192, 2247, 2250, "indicates that Congress 'adopted a policy of self-determination on the part of the Alaska Native people,' and states that the 'lands granted by this Act are not "in trust" and the Native villages are not Indian "reservations."' " *Cape Fox Corp.*, 4 Cl. Ct. at 234 n.25 (quoting *id.*).

C. Any "Indian Country" That Might Have Been Created In Alaska Is Now Under State Jurisdiction

The Ninth Circuit further erred in holding that ANCSA was required to "terminat[e] the federal trust relationship . . . clearly and explicitly" in order to remove "Indian country" status. Pet. App. 21a. There cannot be "federal superintendence" of the use of land set aside for the Indians when the "set aside" itself has been revoked. Even assuming that the land involved was included in "Indian country" prior to ANCSA, Congress' revocation of reserves, conveyance of the prior reserved land in fee simple, extinguishment of other aboriginal title, and express disclaimer of any trusteeship is sufficient to eliminate any possibility that the land is Indian country and to insure that the land is subject to state jurisdiction.[13] *See DeCoteau v. District County Court*, 420 U.S. 425 (1975).

In *DeCoteau*, this Court determined that the 1891 Act terminating the Lake Traverse Reservation and pur-

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[13] In 1971 Congress would have had no reason to express any particular intent respecting a transfer of "Indian country" to state jurisdiction. Thirteen years earlier, Congress had already provided that "[a]ll Indian country within the State" of Alaska would be subject to Alaska's

> jurisdiction over civil causes of action between Indians or to which Indians are parties which arises in areas of Indian country . . . to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.

28 U.S.C. § 1360(a).

Five years after ANCSA was enacted, this Court sharply limited the apparent transfer of general civil jurisdiction set forth in Section 1360. *See Bryan v. Itasca County*, 426 U.S. 373 (1976). But at the time ANCSA was passed, Congress would have expected that the State of Alaska *already* had "full civil and criminal jurisdiction over Indian reservations." *Organized Village of Kake*, 369 U.S. at 74; *see also Williams v. Lee*, 358 U.S. 217, 221 n.6 (1959).

chasing the subject land from the Sisseton and Wahpeton tribes had restored this land to the general jurisdiction of the State of South Dakota. The circumstances of *DeCoteau* are instructive here. Although the Act of Congress involved there reflected a different point in our nation's history, its basic terms were similar: like ANCSA, the "1891 Act . . . appropriate[d] and vest[ed] in the tribe a sum certain—$2.50 per acre—in payment for the express cession and relinquishment of 'all' of the tribe's 'claim, right, title and interest' in the unallotted lands." 420 U.S. at 448. Congress' intent in ANCSA was even more unmistakable: it revoked all reserved designations and all aboriginal titles in return for the payment of a mixed settlement in land and cash. Under *DeCoteau*, any prior reserved land, including that of the Venetie, should now be recognized to fall within the jurisdiction of the State of Alaska.

Notably, the Court in *DeCoteau* did not contemplate the end run around the statute that the Ninth Circuit effected here: *i.e.*, that even if a reservation is terminated it may yet remain "Indian country" because it is the residence of a "dependent Indian community." The Court instead recognized a straightforward rule that where a reservation has been unambiguously terminated it is no longer "Indian country":

> If the lands in question are within a continuing "reservation," jurisdiction is in the tribe and the Federal Government "notwithstanding the issuance of any patent, [such jurisdiction] including rights-of-way running through the reservation." 18 U.S.C. § 1151(a). On the other hand, *if the lands are not within a continuing reservation, jurisdiction is in the State*, except for those land parcels which are "Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151(c).

420 U.S. at 427 n.2 (emphasis added). Importantly, the ongoing federal participation in the affairs of the Sisseton-Wahpeton was at least as extensive in *DeCoteau* as the

Ninth Circuit found with respect to the Venetie here. *See* 420 U.S. at 442-43 ("Federal Indian agents have remained active in the area, and Congress has regularly appropriated funds for the tribes' welfare"). Nonetheless, the Court did not deem their lands to constitute a "dependent Indian community" but recognized that termination of their reservation had left them within the jurisdiction of the State. The same result should apply here.

* * *

After a comprehensive review of the history of the treatment of Alaska by Congress, the courts, and the executive branch, the Solicitor of the Department of the Interior concluded in 1993 that

> ANCSA reflected a new approach in defining the relationship between Alaska Natives and the federal government. ANCSA largely controls the determination whether any territory exists over which Alaska Native villages might exercise governmental powers. Congress has left virtually no room under ANCSA for Native villages in Alaska to exercise governmental power over lands and nonmembers.

1993 Interior Memorandum at 132; *see also id.* at 113-124 (noting at p. 113 that "ANCSA leaves little if any room for finding the existence of a dependent Indian community for purposes of classifying lands as Indian country"). The Ninth Circuit avoided reaching the same conclusion only by improperly holding that this Court's precedents respecting the scope of "Indian country" should be "construed broadly," Pet. App. 10a, and adopting a standard for the recognition of "dependent Indian communities" which is dramatically at odds with the governing precedents of this Court and which upsets the settled expectations of Alaska's citizens and state and local governments. The Ninth Circuit would frustrate the core elements of Congress' legislative settlement under ANCSA. Congress has expressly determined to revoke all Indian reserves within the State of Alaska, with one exception not

pertinent here,[14] and, as a necessary result, to permit the State to govern the related territory unhindered by claims of a competing federal or tribal interest based on a federal guardianship or trusteeship of Native Alaskans or their lands. There is no Indian country in Alaska.[15]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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[14] By explicit statutory terms, Congress preserved the Annette Island Reserve inhabited by the Metlakatlan Indian Community. 43 U.S.C. § 1618(a).

[15] While a relatively small number of allotments were granted in Alaska under allotment authority existing prior to ANCSA, the allotted lands should not be regarded as "Indian country" under 18 U.S.C. § 1151(c). First, there is no basis for regarding allotments held by *individual* native persons as the domain of a sovereign Indian *tribe* such that it ought to be included within "Indian country" for purposes of this Court's jurisprudence respecting tribal sovereignty. *See* 1993 Interior Memorandum at 124. Moreover, for the same reason that the Court has refused to recognize a "checkerboard" of state and Indian sovereignty with respect to fee simple and trust lands located within reservations, *see Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479 (1976), those isolated allotments existing within areas of general state jurisdiction should not be treated as "Indian country."